

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|----------------------------------|---|----------------------|
| PAULA L. MASON |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket Nos. 251,750; |
| PRESBYTERIAN MANORS, INC. |) | 267,092 |
| Respondent |) | |
| Self-Insured |) | |

ORDER

Respondent appealed the April 10, 2002 Award and the April 11, 2002 Award Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on October 2, 2002.

APPEARANCES

Roy T. Artman of Lawrence, Kansas, appeared for claimant. Kathleen N. Wohlgemuth of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the ALJ's Award and Award Nunc Pro Tunc.

The ALJ's Award included two docketed claims for two separate work-related accidents; the first occurred on February 1, 2000, and the second on August 24, 2000. The two claims were consolidated for trial and award purposes with the parties agreeing to an 18 percent functional impairment having resulted from a combination of the two accidents. Accordingly, the parties agreed to combine the two accidents for the purpose of determining claimant's disability and issuing a single award for compensation.

The parties also agreed to arrive at a single compensation rate by averaging the two average weekly wage figures and, in addition, to utilize all of the weeks for which temporary total disability compensation was paid for both accidents when computing the Award. The claimant's average weekly wage in Docket No. 251,750 was \$494.05 and in Docket No. 267,092 it was \$447. 11. The average of these two average weekly wages is \$470.58.

Accordingly, the compensation rate should be \$313.74 ($\$470.58 \times .6667 = \313.74). In the Award, however, the ALJ used a compensation rate of \$313.88 for the permanent partial disability award calculation. Neither party objected or made the compensation rate an issue on appeal. Therefore, it will not be changed in the award portion of this Order. Rather, the Board will use the same compensation rate used by the ALJ. In addition, the ALJ awarded temporary total disability compensation in an amount that was different from the figures presented by either party in their submission letters to the ALJ. Again, neither party objected or made this an issue for the Board's review on appeal. Accordingly, the Board will likewise use the ALJ's temporary total disability figures in its award calculation.¹

ISSUES

The nature and extent of disability, specifically work disability, is the only issue raised for the Board's review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After concluding that claimant had made a good faith effort to find appropriate employment following her accidents, the ALJ utilized claimant's actual post injury average weekly wage of \$274.75 to find claimant's wage loss was 42 percent. Judge Avery found claimant's task loss was 29 percent. By averaging the two as required by K.S.A. 44-510e, the ALJ awarded claimant permanent partial disability compensation based upon a 35.5 percent work disability.

Claimant requests that the ALJ's Award be affirmed. Respondent contends that claimant failed to make a good faith effort to find appropriate employment after she was terminated because she did not cooperate with the job placement counselor respondent provided to her. Respondent argues that claimant retains the ability to earn a wage comparable to that which she was earning while employed by respondent and, therefore, a work disability is not appropriate. Instead, claimant's permanent partial disability

¹ See Letter from Administrative Law Judge Brad E. Avery to Eugene Riling and Kathleen Wohlgemuth (April 8, 2002).

compensation should be limited to her 18 percent impairment of function. In the alternative, should claimant be entitled to a work disability, respondent argues that the task loss opinion of Lowry Jones, Jr., M.D., given when he utilized the tasks claimant testified to, should be used in place of the task list compiled by Ms. Karen Terrill. In so doing, claimant's task loss would be 14 percent rather than 29 percent. And claimant's work disability would be 28 percent when her 14 percent task loss is averaged with her 42 percent wage loss.

The Board finds that claimant made a good faith effort to find appropriate employment after respondent was unable to accommodate her restrictions and terminated her.² Claimant identified numerous potential employers and made numerous job contacts on her own without the benefit of vocational rehabilitation or professional job placement assistance. In fact, her job search proved successful and she found employment. Furthermore, claimant did not act in bad faith in connection with her dealings with Mr. Zumalt, the job placement counselor. The dispute which arose between Mr. Zumalt and claimant's counsel concerning the method and scope of the interview was unfortunate but did not constitute bad faith. The parties never presented their dispute concerning job placement to the ALJ for a resolution. As a result, whether or not Mr. Zumalt's services would have lead to better paying job is purely speculation at this point. Claimant never refused appropriate employment.

As the Board finds claimant made a good faith effort to find appropriate employment, her wage loss can be based on her actual post injury wages.³ In this regard, the parties do not dispute the ALJ's calculation of a 42 percent wage loss. Accordingly, that finding is affirmed.

Respondent does dispute, however, the ALJ's determination of a 29 percent task loss. That finding was arrived at by utilizing the opinion of Dr. Jones based upon a task list compiled by respondent's vocational expert, Karen Terrill. Respondent contends that task list was flawed because claimant failed to provide Ms. Terrill with two jobs that she had performed within the relevant 15 year period immediately preceding her date of accident. Ms. Terrill testified that if she had been informed of these additional jobs, her task list would have included more tasks. Ms. Terrill further testified that, as a result, the task list needed to be modified based upon claimant's complete job history. When the additional job tasks are included, the claimant's task loss is 14 percent rather than 29 percent based on Dr. Jones' testimony. Ms. Terrill testified that she agreed with Dr. Jones' 14 percent

² See *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 886 (1999); *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d, 127, 61 P.3d 101 (2003).

³ See *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

task loss opinion which included the tasks that claimant performed in the jobs that were omitted from Ms. Terrill's list.

The Board agrees that Ms. Terrill's task list was incomplete and therefore flawed. Claimant's testified to a more complete job history and those additional job tasks should be considered. Accordingly, Dr. Jones' 14 percent opinion which is based on claimant's complete 15 year work history, is the most credible and will be adopted by the Board.

When claimant's 42 percent wage loss is averaged with her 14 percent task loss, her work disability is 28 percent. Claimant's permanent partial disability award should be modified to a 28 percent work disability. The Board otherwise agrees with and adopts the findings and conclusions of the ALJ.⁴

WHEREFORE, the Appeals Board finds that the April 10, 2002 Award as modified by the April 11, 2002 Award Nunc Pro Tunc should be modified as follows:

The claimant is entitled to 31.69 weeks of temporary total disability compensation in the amount of \$9,491.81 followed by 111.53 weeks of permanent partial disability compensation at \$313.88 per week or \$35,007.04 for a 28 percent permanent partial general body disability making a total award of \$44,498.85, all of which is currently due and is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining order set forth in the Award Nunc Pro Tunc to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

⁴ Claimant was unemployed and therefore her wage loss was 100 percent from May 31, 2001 through February 4, 2002, but as a result of the accelerated pay out formula in K.S.A. 44-510e and because the compensation rate does not change, it does not affect the award calculation or the final amount due. Therefore, only the final wage loss percentage is used in this award.

Dated this _____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roy T. Artman, Attorney for Claimant
Kathleen N. Wohlgemuth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director